

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARONN JERMAINE OWENS,

Defendant-Appellant.

UNPUBLISHED

June 10, 2014

No. 315046

Wayne Circuit Court

LC No. 12-004563-FC

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of torture, MCL 750.85, assault with intent to commit great bodily harm less than murder, MCL 750.84, assault with intent to maim, MCL 750.86, unlawful imprisonment, MCL 750.349b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve 285 months to 46 years' imprisonment for the torture conviction, 5 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, 5 to 10 years' imprisonment for the assault with intent to maim conviction, and 10 to 15 years' imprisonment for the unlawful imprisonment conviction. He was also sentenced to a consecutive two years for the felony-firearm conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On February 1, 2012, the victim, Daivon Williams, went to defendant's house to purchase marijuana. While there, defendant asked Williams questions about a stolen truck. When Williams claimed to not know anything about it, an unidentified male who was at defendant's house with defendant placed a gun in his lap. Williams was ordered to strip naked. Both defendant and the unidentified male aggressively asked Williams questions about the truck, and Williams continued to deny knowing anything. At some point, defendant got a metal spatula, heated it, and used it to burn Williams's arm. When Williams tried to defend himself, the unidentified male struck him repeatedly in the back of the head with the gun. Williams testified that while he was being hit, defendant threw boiling water on his chest. The questions about the truck continued. Williams attempted to call the individual who apparently stole the truck, but there was no answer. Defendant then went back to the kitchen and returned with the

heated spatula, which he used to burn both of Williams's legs. All the while, the unidentified male with the gun stood over Williams.

Defendant then retrieved a metal hammer and struck the top of Williams's left foot four times. Williams felt the bones in his foot break. Defendant continued to ask about the truck and then, apparently unsatisfied with Williams's answers, struck Williams's right foot with the hammer three times.

Williams was then ordered to go into the basement, where he was made to sit on the floor, still naked, with his knees up. Defendant hit him again with the hammer. Then defendant went upstairs and returned with a can of kerosene and a lighter. He poured the kerosene over Williams, who said that it ran down his face, back, chest, and legs. The next thing he knew he felt heat all over his body and saw flames on his face and arm. He jumped up and ran into a wall. Defendant doused the flames with a pot of water and told Williams they were going for a ride.

Defendant and his accomplice drove Williams from the west side of Detroit to the east side. They stopped the vehicle in front of an alley and ordered Williams to get out and walk away. Williams made it about five steps before he heard a gunshot. The bullet hit him in his right hip. Williams walked to the nearest house and asked for help.

Detroit City Police Officer Dean Muczynski, the first officer on the scene, testified that when he arrived he saw Williams standing naked on the porch. He explained that as he approached Williams:

I started to see skin hanging off of him so I called for medics before I even talked to him. I saw blood around his waist and his feet were deformed, kind of like in angles. So before I did anything, I called for EMS. I didn't want to touch him. . . The lady of the house was kind enough to give us a blanket just to wrap him around, didn't want to squeeze him too tight, he was just screaming.

Williams identified his attacker as "Aaronn" before he was taken by ambulance to the hospital. He stayed at the hospital for 21 days, during which he was able to identify defendant as his attacker from a photo lineup.

Defendant was convicted and sentenced as outlined above. He now appeals as of right.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that his convictions were against the great weight of the evidence because Williams's testimony was seriously impeached at trial and there was a lack of evidentiary support. A verdict is against the great weight of the evidence if the evidence presented "preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Cameron*, 291 Mich App 599, 616-617; 806 NW2d 371 (2011) (internal quotation marks omitted).

Defendant did not preserve this issue by moving for a new trial in the trial court. *Id.* at 617. We denied his request for remand because we were unconvinced of its necessity.¹ Accordingly, we review this unpreserved error for plain error affecting substantial rights. *Id.* “To avoid forfeiture, the defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings.” *Id.* Moreover, even if the defendant satisfies those three requirements, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first argues that Williams’s testimony was seriously impeached and inherently “incredible.” Generally, conflicting testimony and credibility questions are insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). The trial court must defer to the jury’s credibility determinations “unless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it, or [that it] contradicted indisputable physical facts or defied physical realities.’” *Id.* at 645-646 (citation omitted). “If the ‘evidence is nearly balanced, or is such that different minds would naturally and fairly comes to different conclusions,’ the judge may not disturb the jury findings although his judgment might incline him the other way.” *Id.* at 644. Put another way, “[a]bsent exceptional circumstances, issues of witness credibility are for the trier of fact.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

In this case, there are no exceptional circumstances that justify taking the credibility determination away from the jury. The alleged “serious impeachment” consisted of discrepancies between Williams’s trial testimony and what he told the police. Specifically, Officer Muczynski testified that Williams told him that he was at his girlfriend’s home when one perpetrator, not two, pulled him from his house, took him across the street to a vacant dwelling, and tied him up. However, at trial, Williams testified that he went over to defendant’s house to purchase marijuana and was assaulted by two men. He also testified that defendant’s house was not a “vacant house” and denied that someone had pulled him from his girlfriends’ house and tied him up. In fact, at trial, Williams denied telling the police that someone went to his girlfriend’s house, pulled him out, took him to an abandoned house and tied him up.

Accordingly, the record clearly shows that there was a discrepancy; however, it is not the type of inconsistency that would entitle a defendant to a new trial. Williams testified that his initial interview lasted two minutes. It is undisputed that at the time of the first interview Williams had recently been beaten, burned, and severely injured. He explained that he was in a lot of pain at that point. Muczynski testified that Williams was coherent “sometimes” and “would come to and talk to us a little bit and then start screaming in pain again.” Moreover, the jury could have concluded that Williams did not want to admit to police that he had gone to see

¹ *People v Owens*, unpublished order of the Court of Appeals, entered January 21, 2014 (Docket No. 315046).

defendant to buy marijuana. The jury was also instructed that it was free to believe all, none, or part of any person's testimony. Accordingly, even with the inconsistency, Williams's testimony was not impeached so far as to deprive it of all probative value. *Lemmon*, 456 Mich at 645-646.

Defendant next argues that the verdict is against the great weight of the evidence because there was a lack of corroborating physical evidence from the crime scene, including Williams's blood or the presence of kerosene. A reviewing court is not required to evaluate the effect that evidence not of record may have had on the verdict. In other words, a lack of corroborating physical evidence is not germane to a claim that the jury verdict is against the great weight of the evidence because the great-weight claim requires the reviewing court to look at whether the evidence that was presented at trial preponderates against the verdict so heavily that it would be a miscarriage of justice to allow the verdict to stand. See *id.*² That is not the case here.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct when she shifted the burden of proof by implying defendant should have called two witnesses and when she misstated the facts on the record in support of her theory of the case. This issue is unpreserved because defendant did not contemporaneously object and request a curative instruction to address the alleged prosecutorial misconduct. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Unpreserved prosecutorial misconduct claims are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 476.

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id.* "Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel." *Id.*

Defendant first argues that during rebuttal argument the prosecutor shifted the burden of proof when she stated that defense counsel could have called two witnesses. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). The witnesses were defendant's ex-girlfriend, Jarina Howard, and her sister Loraina. Loraina was alternatively referred to as Loraina "Jones" and Loraina "Winbush" during Williams's testimony. During closing arguments, defense counsel stated:

² Additionally, although plaintiff must prove the elements of the charged crimes beyond a reasonable doubt, it is axiomatic that plaintiff does not have to prove its case using specific types of evidence.

Does this version, I call it a story that Mr. Daivon, Daivon, I don't know, Williams, whatever his name is, has fabricated, at least that there are areas that don't add up, that don't make sense. And what would you need as the trier of fact to convince you beyond a reasonable doubt? Are there corroborations? Is there corroboration, is there any other evidence from anybody else who has no ax to grind in this case?

. . . Well, what does he tell the police officer, the first officer that he talked to? He's got some version about being abducted, taken to a vacant house tied up.

Did anybody from the police department go over there? Well, we heard about this mysterious 12-8, scout 12-8 went over to the house, talked to the people. Where are they? Where is Loraina Winbush?

Where is Daivon Williams' ex-girlfriend? Because he's changed his story, ladies and gentlemen.

In response, the prosecutor argued:

Where is Loraina Winbush and the ex-girlfriend? [Defense counsel] could have brought them in just fine and dandy. They weren't there. They he [sic] weren't there, at all. He could have brought them in and put them on the stand, no problem.

I could bring in my sister, does it help you decide if Mr. Williams is telling the truth? No. Let's see if that sticks. Let's throw that against the wall.

Speculate. I know, he wants to talk about what he knows. You listened to the testimony, you know. You weren't there. I wasn't there. [Defense counsel] wasn't there.

The prosecutor's comment was in direct response to portions of defense counsel's closing argument. The implication of defense counsel's argument was that the uncalled witnesses could not corroborate Williams's fabricated and changed story. The prosecutor's comments were in response to defense counsel's argument and did not shift the burden of proof. Moreover, the court instructed the jury that the prosecutor had the burden of proof on each element that the defendant was "not required to prove his innocence or to do anything." We are presented with nothing that would undermine the presumption that the jury followed its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor committed misconduct by misstating the facts. During closing argument, defense counsel argued that Williams had fabricated a story about what happened. He argued that "there are areas that don't add up, that don't make sense" and, in particular, that Williams initially concocted a story about a single person taking him from his house to a vacant dwelling. During rebuttal, the prosecutor commented:

Did [defense counsel] ever once shake [Williams] on his identification? Ever once? Did you ever once hear him be able to impeach him as to identification, ever once? No.

He's gotta tell you a story? A story? You can't make this stuff up.

* * *

He only said one guy, oh, well, he must be lying because he only said one guy to the officer at the time. He said the name he knew at the time, Aaronn Owens, always goes back to Aaronn Owens.

Defendant asserts that this was a misstatement of the facts because at the initial police interview, Williams did not identify "Aaronn Owens." Rather, he said "Aaronn" was his attacker.

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial," but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Unger*, 278 Mich App at 236, 241. It is undisputed that Williams only identified his attacker using the name "Aaronn" and a description of a "heavier set black male about 250 pounds." However, defendant's argument takes the prosecutor's statement too literally. The prosecutor was not stating that defendant initially identified his attacker by his first and last names, but rather that defendant consistently identified the person Aaronn Owens as his attacker. Williams picked defendant out of a photo lineup and identified defendant at the preliminary examination and at trial. Accordingly, there is no prosecutorial misconduct.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel was ineffective for failing to object to the prosecutorial misconduct. "When no *Ginther*^[3] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Because there was no prosecutorial misconduct, defense counsel was not ineffective for failing to object. Defense counsel is not required to advocate a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

V. SENTENCING

Finally, defendant argues that the trial court violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution by engaging in judicial fact-finding that raised his minimum sentence in violation of the United States Supreme Court's decision in *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). However, in *People v Herron*, 303 Mich App 392, 405; ___ NW2d ___ (2013), this Court held that *Alleyne* does not apply to Michigan's legislative sentencing guidelines:

We hold that judicial fact-finding to score Michigan's guidelines falls within the "wide discretion" accorded a sentencing judge "in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]" *Alleyne*, 570 US at ___ n 6; 133 S Ct at 2163 n 6, quoting *Williams [v New York]*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949).] Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163.

This Court is bound to follow *Herron*. MCR 7.215(J)(1).

VI. DEFENDANT'S STANDARD 4 BRIEF

In his Standard 4 Brief, defendant argues that he received ineffective assistance of counsel during plea negotiations. Specifically, defendant alleges that he was misinformed concerning his sentence exposure. He claims that he was informed that the sentencing guidelines range was 11 to 18 years when, in fact, the guidelines range was 14 to 23 years.

Criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. *Lafler v Cooper*, ___ US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012); *Missouri v Frye*, ___ U.S. ___; 132 S Ct 1399, 1405; 182 L Ed 2d 379 (2012). "The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). A defendant's trial counsel must explain to the defendant "the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice." *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S Ct at 1384.

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result

of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. [*Frye*, 132 S Ct 1409.]

At a July 6, 2010, final conference, the following exchange took place:

MS. WALSH [prosecutor]: The People had extended an offer. The guidelines are 11 to 18. He is charged with assault with intent to murder, torture, assault with intent to maim, unlawful imprisonment and felony firearm. For a plea of guilt to Count One, AWIM, Count Two, torture, Count Three, FF, the People would do an agreement to 10 to 18 plus two.

THE COURT: Mr. Winters?

MR. WINTERS [defense counsel]: I've conveyed that offer to Mr. Owens, your Honor, and it's rejected.

THE COURT: Okay. Very well.

He has rejected the offer?

MR. WINTERS: That's correct.

Mr. Owens, did I tell you what that generous offer was from the Wayne County prosecutor's office?

DEFENDANT OWENS: Yes, he did, Ms. Parker.

THE COURT: We will be going forward with a jury trial.

DEFENDANT OWENS: Correct.

Defendant has not moved to remand for a *Ginther* hearing on this issue and, therefore, the record is scant on the matter of plea negotiations. What is crystal clear is defendant's steadfast claim of innocence throughout the proceedings. Given defense counsel's reference to the prosecutor's "generous offer" it appears more likely than not that defense counsel would have encouraged defendant to accept the offer. Even if defendant did not receive accurate information, there is no evidence in the record that defendant would have accepted a plea; instead, defendant's rejection of the offer appears to have been based on his claim of innocence. Therefore, defendant has failed in his burden of showing that he would have accepted the offer if he had been aware of the proper sentencing guidelines.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly